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No. 84-1538

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ALEXANDRA FISHER, MARGUERITE JACOBS, MORT BAKER, RICHARD LAWHORN and ANTHONY KERSHAW, individuals; and LEVIN-ZEMEL, a California corporation,
Appellants,

v.

CITY OF BERKELEY, a municipal corporation; BERKELEY CITY COUNCIL; and BERKELEY RENT STABILIZATION BOARD,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA

BRIEF AMICUS CURIAE OF THE CALIFORNIA APARTMENT ASSOCIATION IN SUPPORT OF APPELLANTS

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INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 36.2, the California Apartment Association respectfully submits this brief amicus curiae in support of plaintiffs and appellants, Alexandra Fisher, et al. Written consent to the filing of this brief has been granted by counsel for all parties and lodged with the Clerk of this Court.

Amicus curiae California Apartment Association is a nonprofit association which represents the interests of the more than 352,000 owners of residential rental property in California.

These owners, a majority of whom have their savings invested in modest holdings of four units or less, provide shelter for over 4 million households in the State of California. Many of these owners have seen in recent years the imposition without state sanction of severe local rent controls which have devastated their investment-backed expectations of both profitability and marketability. As a result, the expansion of this industry—and of the housing supply and other industries related thereto—has been virtually frozen in rent-controlled California cities. Growth has also been substantially impaired in uncontrolled areas due to the reasonable fears of investors that increasing numbers of politicians will discover that the cheapest way to subsidize housing costs and thereby curry the favor of renter constituents is to abandon the free market in favor of price regulation.

The California Apartment Association has played a principal role below in the presentation of the antitrust challenge now before this Court, and appears herein to urge the Court to declare Berkeley's ordinance preempted by federal law.

INTRODUCTION

Rental property owners in the City of Berkeley are trapped in a legal and financial straightjacket retroactively imposed upon them by regulatory fiat. This is the precise result sought by the principal architects of the Berkeley rent control movement, the Community Ownership Organizing Project, as declared in their Manifesto:

> By enacting rent control and thereby restricting increases in future rents, a city may actually reduce the present value of a property. This is essentially community expropriation in favor of tenants . . . . Stringent rent control in Berkeley's speculative real estate market would greatly cut the value of rental property. Since other private owners would be unlikely to buy the property in such an unfavorable climate, the city could purchase the property at below market prices or aid tenants in converting the property to cooperative ownership. [*The Cities' Wealth: Programs for Community Economic Control in Berkeley, California* (Institute for Policy Studies, Washington, D.C., 1976), at 21.]

This tendency to abuse majoritarian power to divest private landowners is familiar enough, although some of Berkeley's actions are extreme even by modern standards. Indeed, it is significant that landowners have been singled our for profit deprivation when the prices of food, clothing, and other necessities continue to rise uncontrolled, amid unproven and indefensible assertions of unconscionable profit-taking by landowners. This is nothing new. The risk that the unlanded majority would abuse its political power to take unto themselves the property of the minority for essentially private purposes disguised as an alleged public good was acknowledged by our Founding Fathers.[1]

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[1] Wherever the real power in Government lies, there is the danger of oppression. In our Government the real power lies in the majority of the Community, and the invasion of private rights is *chiefly* to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the Constituents. [Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), reprinted in 5 *The Writings of James Madison* at 272.]

Complaints are every where heard . . . that our governments are too unstable, that the public good is disregarded in the conflicts of rival parties; and that measures are too often decided, *not according to the rules of justice and the rights of the minor party, but by the superior force of an interested and overbearing majority* . . .

[Factions develop whereby] a number of citizens, whether amounting to a majority or minority of the whole, . . . are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.

• • •

[T]he most common and durable source of factions, has been the various and unequal distribution of property. Those who hold, and those who are without property, have ever formed distinct interest in society . . . . A landed interest, a manufacturing interest, a mercantile interest, a moneyed interest, with many lesser interests, grow up of necessity in civilized nations, and divide them into different classes, actuated by different sentiments and views. The regulation of these various and interfering interests forms the pricnipal task of modern legislation . . .

• • •

When a majority is included in a faction, the form of popular government . . . enables it to sacrifice to its ruling passion or interest, both the public good and the rights of other citizens . . .

• • •

[In a pure democracy a] common passion or interest will, in almost every case, be felt by a majority of the whole; . . . there is nothing to check the inducements to sacrifice the weaker party or an obnoxious individual. . . . [The Federalist No. 10, at 104-109 (J. Madison) (Hamilton ed. 1868) (emphasis added).

The risk of "tyranny of the majority" is inherent in any democracy but becomes particularly acute when elevated from mob sentiment to local governmental policy. Berkeley is not interested in the cooperative partnership of federalism, but rather has evinced an approach to state and federal policy inputs that is perhaps best described as secessionist. In its efforts to control, dominate, and ultimately confiscate private rental properties, it has not evidenced an interest in reconciling its own objectives with national economic policy or the "supply-side" approach to housing taken by its national and state governments, but rather claims a quasi-sovereignty that immunizes it from any obligation to cooperate in a federalist relationship wherein true sovereignty prevails over local parochialism. The California court below acknowledged the plain reality of the matter: "California has no rent control statute." Opinion below, 37 Cal.3d at 655, Appendix A to Jurisdictional Statement ("Appendix") at A-6, quoting from *Birkenfeld* v. *City of Berkeley,* 17 Cal.3d 129, 141 (1976). By no stretch of the imagination are Berkeley's exploits part of any expressly and consciously adopted state policy to abolish market freedom in rental properties in favor of local rent and price controls. Rather, those exploits are an extreme example of the narrow "parochial interests" to which this Court and the Congress have repeatedly declined to subjugate the national procompetitive policy embodied in the Sherman Act, 15 U.S.C. section 1 et seq.

The California Supreme Court has offered no shelter for besieged landowners. In *Nash* v. *City of Santa Monica,* 37 Cal.3d 97 (1984), that court held that the city could prevent an owner from implementing his business decision to completely withdraw from rental property ownership. Although Berkeley denies that its schemes deter market entry, it has similarly enacted such ordinances to stem the flight of beleaguered owners from the market. Berkeley Ordinances Nos. 5626-N.S. and 5627 N.S. In *Becker* v. *IRM Corp.,* 38 Cal.3d 454, (1985), that court ruled that, unlike any other lessor of a product that reached him in a used condition, a lessor who had purchased existing real property is strictly liable in tort, in the absence of any culpable negligence, for preexisting latent defects which cause injury. The California court, of course, is

the author of *Agins* v. *City of Tiburon,* 24 Cal.3d 266 (1979), and *San Diego Gas & Electric Co.* v. *San Diego,* 450 U.S. 621 (1981), holding that even if one can prove that an oppressive regulation deprives all beneficial use of property, the sole remedy for this "taking" is injunction, excluding "just compensation" for the millions of dollars confiscated *pendente lite.* And now, in the instant action, the California court has held that national economic policy favoring independent competitive pricing may be shunted aside by municipal policy which meets its novel federal test subject only to a "less restrictive means" showing never before upheld as an obstacle to express federal enactments.

The landowners and businesspersons of California look to this Court, in this case, for relief and protection. The lower court's opinion herein has no bounds and is not in any fashion restricted to housing. It sets forth a standard whereby Berkeley could choose to adopt a totally controlled economy, dictating the price and availability of all goods and services in the city, and defend that this choice to abandon the competitive regime in favor of government control is rationally related to its local police powers. If one's objective is a price rollback, there is no "less intrusive means" than to simply compel one. We demonstrate herein that the decision below is faulty in its application of the Supremacy Clause to express federal enactments, and that Berkeley's ordinance clearly thwarts the economic objectives of the Sherman Act. By tracing the history of both the economic and the federalist policies of the Sherman Act, it is shown that the national policy is offended, while comity declines to tolerate Berkeley's conduct. Congress has ratified this Court's decisions declaring that only *state* policies and implementations thereof are exempt from the preemptive and prohibitive weight of the Sherman Act, and we establish herein that no California policy supports Berkeley's price-fixing scheme. The ultimate issue, we submit, is whether this Court should thoroughly undermine or override this Court's municipal "state action" precedents, as did the court below, in the immediate wake of the Congressional adoption of those decisions as legislative policy.

SUMMARY OF ARGUMENT

Where a state enacts a program to fix and manipulate the price of a commodity there unquestionably arises a conflict with federal statutory policy favoring free competitive pricing. As this Court adjudicated over forty years ago, however, the Congress did not intend to prohibit anticompetitive actions by a sovereign state in furtherance of state policy to displace competition with regulation, and so they are exempt from preemption.

Where a state program purports to authorize private parties to fix and manipulate prices, without adequate state control and supervision to ensure state policy is the predominant force, however, the conflict results in a judgment of invalidity, for the bounds of the exemption have been exceeded.

Just as with such state laws, municipal ordinances which fix and manipulate market prices are on their face in conflict with federal economic policy. They are exempt under existing precedent only where undertaken pursuant to affirmatively expressed state policy. In the absence thereof, as with the state program which exceeds the bounds of the exemption, the parochial activity is invalid pursuant to the supremacy of federal law.

This action presents a preemption challenge to municipal conduct which is plainly obstructive and hostile to national economic policies enacted by the Congress. At issue is naked price-fixing by a city government which has decided that the federal goal of open competition is undesirable and should be discarded in favor of market regulation by a locally constituted anti-capitalist bureaucracy.

Yet that choice to discard the national ideals of open competition and free setting of market price is clearly a prerogative preserved under our federalist system to Congress itself and, through Congressional deference, to state governments. As this Court's decisions and recent Congressional action demonstrate, Congress has the power to require cities to abide by Congressional economic policy with respect to economic activity affecting interstate commerce; and the operation

of rental housing is "unquestionably such an activity." *Russell* v. *United States,* 53 U.S.L.W. 4652 (No. 84-435, June 3, 1985). Out of federalist comity and political wisdom Congress has placed its confidence in the competence of state legislatures to make informed policy decisions displacing national competitive policy, while denying that discretion to local governments in the absence of such policy choices by their respective state sovereigns. The California State Legislature has never adopted any policy abandoning price competition in housing in favor of price regulation.

Much confusion has been engendered by the contention that all municipal programs throughout the lar d are placed at risk—with resultant chaos and public tragedies—should this Court simply reaffirm existing precedent and declare that only a state legislature can authorize municipal action which thwarts the economic objectives of the Sherman Act. Whatever may ultimately be adjudicated as to myriad municipal actions *not* before this Court herein, the instant arrangement in issue dictates prices to market participants with an avowed purpose of price stabilization—clearly thwarting those federal objectives. The most significant faults in these cries of impending doom are twofold: (1) All that is before the Court at this time is municipal price-fixing of independent traders' prices, certainly a very narrow segment of municipal activity, and (2) State legislatures are worthy of the confidence and respect afforded them by the Congress and are quite capable of discerning and responding to any pressing need for municipal regulation.

It is the cities, and not the Appellants, who display distrust for the states. Although they argue that essential municipal functions will be disrupted, in fact the vast majority of municipal functions have no direct impact on market freedom and are, in any event, duly authorized by "state action." As we demonstrate herein, California is the only state known to *amicus* wherein municipalities fix rents *without any* state law specifically addressing the issue; conversely, rent control is the only municipal price-fixing scheme in California *not* already enjoying state authorization. It is submitted that preemption of this pernicious practice will not have the broad, sweeping effects previously proclaimed by Berkeley and its supporters. It

will not even mean Berkeley may *never* control rents. It will simply mean that before Berkeley may subject the market to local price control it and other similarly situated municipalities will first have to persuade the State Legislature that a grant of the power and discretion to displace competitive freedoms with a controlled economy is necessary and appropriate to accomplish important public objectives.

It is that *allocation of power* issue which is at the heart of this dispute. Berkeley is understandably jealous of its independence to pursue its own "parochial interests." Confronted with well-established precedent holding that its independence stops short of the power to unilaterally declare itself immune from this economic policy of the Sherman Act, Berkeley has urged a rule that "health, safety, and welfare"-motivated restraints on trade be deemed compatible with federal economic policy irrespective of their market effects and despite the fact the Congress recently rejected such a formulation. Since it is well established that health, safety, and welfare roughly define the limits of the police power, the essence of the argument is that any police power action—and hence any action a city takes—is presumably immune to the Sherman Act's proscriptions and policies.

Price is the central nervous system of the economy. Any combination which tampers with price structures is illegal per se. It cannot be doubted at this point that the policy of the Sherman Act abhors and cannot abide non-market manipulation and stabilization of price. Congress has sanctioned *state* action in conflict therewith as a tolerable conflict pursuant to notions of federalism, while expressly defining the remedies for municipal action in conflict therewith, including preemptive injunction. The question whether and how political status enters this issue has been resolved by the Congress. Conflict is an *economic* issue, not a political status issue. Municipal rent controls produce the same types of market disturbances as would identical privately created price-fixing agreements which *unquestionably* would be condemned as Sherman Act violations. We submit that Berkeley's controls on private sector rents are in unavoidable conflict with federal statutory policy, enjoy no "state action" immunity, and are accordingly preempted by federal law.

ARGUMENT

I. THE POLICIES AND OBJECTIVES OF THE SHERMAN ACT ARE IN CONFLICT WITH BERKELEY'S PRICE-FIXING SCHEME

The Congress has established economic and political policies with regard to the Sherman Act. Those economic policies are clearly offended by any arrangement which interferes with the setting of price by independent market participants, as has been clearly and repeatedly declared by this Court. The political policy of the Sherman Act, as declared by this Court and ratified by recent Congressional action, is to *tolerate* for federalist comity reasons "state action" which places regulatory programs in conflict with federal economic policy, reasoning that *states* are entitled to the discretion to experiment with regulatory displacement of the competitive economic regime. That discretion, however, is reserved to *state* legislative bodies, and is not granted to municipal policymakers. The Congressional response to municipal efforts to overturn this Court's *City of Lafayette* v. *Louisiana Power and Light Co.*, 435 U.S. 389 (1978) and *Community Communications Co.* v. *City of Boulder*, 455 U.S. 40 (1982) decisions was to decline to do so, instead merely lifting the onerous sanction of *damage* judgments while consciously preserving injunctive remedies.

The confusion inherent in the opinion below and in Berkeley's and its supporters' positions taken to date, favoring a "health, safety and welfare" exception to the Sherman Act, is that it seeks to inject a new "political status" test into the question of substantive (economic) conflict with the Sherman Act. Regardless of its noble objective, this attempt to redefine the test of preemption is in reality little more than a shell game to disguise reassertion of arguments heretofore expressly denied by the Congress and this Court.

A. Freedom From Price Manipulation is the Very Heart of Sherman Act Economic Policy

This Court and the Congress have decided that, in the absence of clearly articulated and affirmatively expressed *state* policy displacing competition with regulation, municipal acts

which are anticompetitive in effect and thereby obstruct federal policy as expressed in the Sherman Act are preempted.

The course of conduct in which Berkeley is engaged is unquestionably price-fixing. A specific maximum rent is dictated for each of some 23,000 rental units. Ordinance, Appendix G at A-109, Sections 10-12. Noncompliance by any owner is punished by various remedies ranging from rent withholding by tenants to a year's imprisonment (*Id.*, Sections 11, 12, 13, 15, 19).

This is not the vague type of cause-and-effect found nonetheless to be a price-fixing arrangement in *United States* v. *Container Corp. of America*, 393 U.S. 333 (1969). Here "a naked agreement [is] clearly shown, and the effect on prices is plain." *Goldfarb* v. *Virginia State Bar*, 421 U.S. 733, 782 (1975). As in *Goldfarb*, the "agreement" derives from a coercive threat of sanctions. *See also Albrecht* v. *The Herald Co.*, 390 U.S. 145, 150 n.6 (1968); *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134, 142 (1968); *United States* v. *Bausch & Lomb Optical Co.*, 321 U.S. 707 (1944).

By enacting the Sherman Act, Congress "sought to establish a regime of competition as the fundamental principle governing commerce in this country." *City of Lafayette* v. *Louisiana Power & Light Company*, 435 U.S. 389, 398 (1978). The prohibition against price manipulation is absolutely essential to the preservation of that regime of competition, for all variables in commerce revolve in some fashion around price: price is the "central nervous system of the economy." *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 226 n.59 (1940).

This Court has repeatedly observed the seriousness of the threat price manipulation poses to market efficiency despite the claims of uniqueness, compelling need or salutary motive commonly made by price-fixers. Price-fixing has long been regarded a per se violation because generically it fundamentally disrupts normal market interaction, substituting for the "regime of competition" a regime of monopolistic or oligopolistic control. Because this displacement of the competitive regime tends invariably to impact upon market factors beyond the instant

fixed commodity, price-fixing is banned whether the effort is to fix minimum or maximum prices. *Albrecht* v. *The Herald Company*, 390 U.S. 145, 152-153 (1968); *Kiefer-Stewart Co.* v. *Joseph E. Seagram and Sons*, 340 U.S. 211, 313 (1951); *Arizona* v. *Maricopa County Medical Society*, 457 U.S. 322, 348 (1981). Similarly, because it matters not to the resultant market effects, price-fixing is prohibited whether the prices are fixed by the sellers or (perhaps involuntarily) imposed upon them by another, third party. *Simpson* v. *Union Oil Co.*, 377 U.S. 13 (1964); *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U.S. 384 (1951). As this Court succinctly stated in *United States* v. *McKesson & Robbins*, 351 U.S. 305 (1956):

> It has been held too often to require elaboration now that price fixing is contrary to the policy of competition underlying the Sherman Act and that its illegality does not depend on a showing of its unreasonableness, since it is conclusively presumed to be unreasonable. It makes no difference whether the motives of the participants are good or evil; whether the price fixing is accomplished by express contract or by some more subtle means; whether the participants possess market control; whether the amount of interstate commerce affected is large or small; or whether the effect of the agreement is to raise or to decrease prices. [351 U.S. at 309-310 (footnotes omitted).]

By enacting the Sherman Act, Congress has determined that competition in this Nation should be protected. Thus, the "Rule of Reason" often discussed in antitrust cases does not permit inquiry into the wisdom of permitting competition in various areas on a case by case basis.

> Ruinous competition, financial disaster, evils of price cutting and the like appear throughout our history as ostensible justifications for price-fixing. If the so called competitive abuses were to be appraised here, the reasonableness of prices would necessarily become an issue in every price-fixing case. In that event, the Sherman Act would soon be emasculated; its philosophy would be supplanted by one which is wholly alien to a system of free competition; it would not be the charter of freedom which its framers intended. [*United States* v. *Socony-Vacuum Oil Co.* 310 U.S. 150, 221 (1940).]

> Whatever economic justification particular price-fixing agreements may be thought to have, the law does not permit an inquiry into their reasonableness. They are all banned because of their actual or potential threat to the central nervous system of the economy. [*Id.* at 226 n.59.]

This Court met head-on the issue of whether the "Rule of Reason" permitted an attack on the wisdom of preserving competition in certain areas in *National Society of Professional Engineers* v. *United States*, 435 U.S. 679 (1978). In that case, N.S.P.E. had adopted a canon of ethics prohibiting its members from submitting competitive bids for engineering services. The United States sought an injunction in a civil antitrust action to nullify the canon as a restraint upon competition. N.S.P.E. argued that the canon fell within the "Rule of Reason" because "competition among professional engineers was contrary to the public interest" (435 U.S. at 684) because it would result in degradation of the quality of engineering services with resulting risk to the public health, safety, and welfare. The Court had no qualms about rejecting this argument:

> Contrary to its name, the Rule does not open the field of antitrust inquiry to any argument in favor of a challenged restraint that may fall within the realm of reason. Instead, it focuses directly upon the challenged restraint's impact on competitive conditions. [*Id.* at 688.]
>
> In sum, the Rule of Reason does not support a defense based on the assumption that competition itself is unreasonable. [*Id.* at 696.]

More recently, in *Arizona* v. *Maricopa County Medical Society*, 457 U.S. 332 (1981), the Court invalidated a presumably well-intentioned price-fixing agreement which was alleged to be procompetitive in effect. In that case, two Arizona medical foundations, by agreement of their member doctors, established the maximum fees the doctors could claim as payment for health services provided to policyholders of specified insurance plans. It was asserted that the fee schedules were "procompetitive" because they made it possible to provide health care consumers with a uniquely desirable form of insurance coverage that they could not otherwise afford. *Id.* at 349. The Court responded:

> The anticompetitive potential inherent in all price-fixing agreements justifies their facial invalidation even if procompetitive justifications are offered for some. Those claims of enhanced competition are so unlikely to prove significant in any particular case that we adhere to the rule of law [per se rule] that is justified in its general application. [*Id.* at 351.]

These edicts leave no room for doubt that any arrangement, such as rent control, which " 'interfere[s] with the setting of price by free-market forces' (citation) is illegal on its face." *Professional Engineers,* supra, 435 U.S. at 696. It simply cannot be argued that other socially desirable objectives are met by suppressing competition. As cogently stated by Mr. Justice Stevens in the *Maricopa County* opinion, supra:

> Our adherence to the per se rule is grounded not only on economic prediction, judicial convenience, and business certainty, but also on a recognition of the respective roles of the Judiciary and the Congress in regulating the economy. *United States* v. *Topco Associates, Inc.*, 405 U.S. at 611-612. Given its generality, our enforcement of the Sherman Act has required the Court to provide much of its substantive content. By articulating the rules of law with some clarity and by adhering to rules that are justified in their general application, however, we enhance the legislative prerogative to amend the law. The respondents' arguments against application of the per se rule in this case therefore are better directed to the Legislature. Congress may consider the exception that we are not free to read into the statute. [*Arizona* v. *Maricopa County Medical Society,* supra, 332 U.S. at 354-355. *Compare,* Opinion below, 37 Cal.3d at 667-671, Appendix A at A-21-A-26.]

Before the Court in this case stands an ordinance with the avowed purpose to "regulate residential rent increases." Ordinance, Section 3, Appendix G at A-111. It is absolutely without question that were an organization of property owners to convene a meeting with such an objective this Court would find a criminal conspiracy in violation of Section 1 of the Sherman Act irrespective of the prices fixed or the conspirators' market

power, prior even to any overt act of adjusting the actual rents collected. *See, e.g., Maricopa County,* supra, 332 U.S. at 351; *Socony-Vacuum,* supra, 310 U.S. at 225-226 n.59. Even if it were shown to the Court's satisfaction that the fixed rents were reasonable and that the participants' objective was noble self-regulation imposed to police and prevent extraordinary and oppressive rent increases—even if the owners adopted verbatim Berkeley's entire statement of purpose (reproduced in Appendix G at A-111) and could establish conclusively their sincerity in those objectives—under the precedents it is clear that this Court nonetheless would have little choice but to declare that combination an unlawful affront to the Sherman Act. Berkeley's municipal status, acting as it is utterly without any sheltering state policy, should offer no different conclusions, for the economic policy of the Sherman Act, and the interplay of market forces which it seeks to preserve, are indifferent to the identity of economic saboteurs, responding only to the market damage they have wrought.

The disruption wrought by rent controls upon a housing market is well-understood by economists, although they may differ about the social utility of the economic dislocation. Despite its political attractiveness and resilience due to its dispensation of short-term monetary "bonuses" to a politically powerful local constituency, rent control as a solution to the housing crisis is a failed policy, an aggravant rather than the promised salve, much like the misguided folk remedy of buttering a burn. It produces illusory short-term symptomatic relief while geometrically worsening the problem, delaying or obstructing genuine curative measures.

With the imposition of a comprehensive scheme of market controls like Berkeley's[2] the competitive forces in the market become paralyzed. Deprived of the right to obtain a better price for a better product, product standardization and mediocrity set in. Market entry could not be better prevented than with the promise of oppressive regulation, so new supply of competing units is effectively foreclosed, locking in the existing imbalance of supply and demand and perpetuating the housing crisis. Without any means of maximizing profits by competing with features and services that could bring a better price, many owners must squeeze out what they can by trimming overhead—thereby reducing maintenance, service and the general quality of the housing stock. Owners become highly motivated to extricate their capital from such predatory abuse, and cities respond with prohibitions against condominium conversion, vacating or demolishing the building. With supply frozen and demand growing due to attractive, below-market rents, demand begins to spill over out of necessity into entry-level purchase dwellings, driving those prices skyward. In short, rent controls impact not only price but availability, variety, and quality of rental housing, as well as price and availability of entry level home purchases, and the construction, finance, material and title industries which would participate in the cash flow deterred by this effective bar to new rental construction. *See* Muth, *Redistribution of Income Through Regulation in Housing,* 32 Emory L.J. 692 (1983). Nor does the exemption of new construction from controls assuage the fears of potential investors. As observed by Professor Muth, "Even if new units may be exempt from controls, potential investors in rented property may fear that new units will subsequently be made subject to controls, the actual experience in New York City." *Id.* at 696. Add to that the experience of the victims of Berkeley's own whims; the Ordinance (Section 5(f), Appendix G at A-114) repeals a former exemption for owner-occupied quadplexes and triplexes. Berkeley's treatment of owners who purchased or built properties in reliance upon that illusory exemption surely will not be ignored by prospective investors.

For purposes of determining whether rent controls conflict with federal economic policy, it is not so important that rent

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[2] Berkeley's scheme is far more restrictive than the moderate, state-authorized control systems common to Eastern states, notably in its denial of "vacancy decontrol," a common feature permitting the rent on a vacant unit to be brought up to market value on the initial reletting (*See* Rabin, *The Revolution in Residential Landlord-Tenant Law: Causes and Consequences,* 69 Cornell L. Rev. 517, 556 n.214 (1984)); its harsh restrictions on "pass-through" expenses, imposing regulators' judgments over those of the owner as to "necessity" or "avoidability" of refinancing or capital improvement (Ordinance, Section 12(c), (d), Appendix G at A-129, 130); and its complex restrictions upon unlawful detainer (*Id.,* Section 13, at A-131-136). The

(footnote continued on following page)

(footnote continued from preceding page)

potential for abuse has been exacerbated by enactments effectively barring lessors—but not lessees—from sitting on the Rent Stabilization Board. [Berkeley Charter Amendment "N", Nov. 2, 1982, Section 121(3).]

control is meat-axe surgery as it is that it is surgery at all. It is unquestioned that rent control replaces the allocative efficiencies of the marketplace with redistributive inefficiencies sacrificing the regime of competition to other policies.[3]

Rent control is a very potent market interference which represents a local policy choice, a choice to discard the competitive regime in pursuit of some other imagined social policy or objective; recognition of those realities, that rent control *effectively* subverts normal market processes, and *purposefully* does so to pursue other policy goals distinct from antitrust policy, leads inexorably to the realization that such controls "conflict" with the objectives and policies of the Sherman Act. Berkeley has purposefully banished—criminalized, in fact—the competitive regime in favor of a fully controlled market in rental housing. This Court need not decide the policy questions regarding the efficacy or fairness of Berkeley's controls as a solution to housing inadequacies to find that Berkeley's scheme is preempted; rather, it is adequate to find that the Sherman Act policy protecting the "setting of price by free market forces," *United States* v. *Container Corp.*, 393 U.S. 333, 337 (1969), has been effectively and purposefully displaced by a local ban on the very conduct encouraged by federal law. The federal and local statutory schemes are in express conflict, since the facial subjugation of lessors to Berkeley's dictates certainly creates a "combination in restraint in trade." Even more evident, however, is the obstacle that Berkeley's scheme presents to the attainment of a central objective of the Sherman Act, the setting of price by free market forces. As stated by Professor Tribe,

> But state and federal laws need not be contradictory on their face for the latter to supersede the former: there are more subtle forms of actual conflict. Even if state action does not go so far as to prohibit the very acts which the federal government requires (or vice versa), it may nonetheless be struck down if it is in "actual conflict" with the objectives that underlie federal enactments. Thus, state action must be invalidated if its effect is to discourage conduct that federal action seeks to encourage. [Tribe, *American Constitutional Law,* Section 6-24 (Foundation Press, 1978). See also *Nash* v. *Florida Industrial Commission,* 389 U.S. 235 (1967); *Jones* v. *Rath Packing Co.,* 430 U.S. 519 (1977).]

[3] *See* Muth, supra; Siegan, *Commentary on Redistribution of Income Through Regulation in Housing,* 32 Emory L.J. 733 (1983); Baird, *Rent Control; The Perennial Folly* (1980) at 54-78; *Rent Control, a Popular Paradox* (Fraser Institute Ed. 1975); Rabin, *The Revolution in Residential Landlord-Tenant Law,* 69 Cornell L. Rev. 517, 555 (1984); Friedman & Stigler, *Roofs or Ceilings? The Current Housing Problem,* in *Rent Control, a Popular Paradox,* supra, at 100; Hirsch, *From "Food for Thought" to "Empirical Evidence" About Consequences of Landlord-Tenant Laws,* 69 Cornell L. Rev. 604, 609-610 (1984).

There can be little doubt that the economic purposes, objectives and effects of Berkeley's scheme obstruct the attainment of the purposes and objectives of the Sherman Act in the Berkeley housing market. *See Hines* v. *Davidowitz,* 312 U.S. 52 (1941). "Conflict" exists. The remaining question is whether the Congress intended to tolerate this conflict, or to preempt such anticompetitive municipal action under these circumstances.

B. The Federalist Policy of the Antitrust Laws Does Not Excuse Berkeley's Schemes

Local action is preempted by federal statute where the former discourages or prohibits conduct the federal enactment seeks to encourage. Where the Congress has indicated an intention to tolerate conflicting regulation by states or local entities, however, no preemptive intent exists.

In *Parker* v. *Brown,* 317 U.S. 341, this Court determines that a state raisin pricing scheme, although clearly in conflict with Sherman Act economic policy, *Id.* at 350, nonetheless was insulated by a state action exemption. The Court found that given the federalist considerations, "an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress," *Id.* at 351.

More recently, in *California Retail Liquor Dealers Assn.* v. *Midcal Aluminum,* 455 U.S. 97 (1980), a limitation upon that state exemption became clear: If the anticompetitive decisions are not in fact being made by the state, but by private parties, and the state is not supervising their activity (so as to ensure adherence to state policy), this exemption is lost and the price-

fixing scheme is invalid *despite* its statutory roots. *See Town of Hallie* v. *City of Eau Claire,* 105 S.Ct. 1720 n.10 (1985).

The issue of preemptive intent as to political subdivisions of the state—sometimes referred to alternatively as "immunity" or "exemption"—has been addressed recently. In *City of Lafayette* v. *Louisiana Power & Light Co.,* 435 U.S. 389 (1978), this Court held that the "state action exemption" of *Parker* is not freely available to cities, stating that,

> "Plainly petitioners are in error in arguing that *Parker* held that all governmental entities, whether state agencies or subdivisions of a state, are, simply by reason of their status as such, exempt from the antitrust laws." [435 U.S. at 408.]

The Court concluded that the *Parker* doctrine protected only that anticompetitive conduct

> "[E]ngaged in as an act of government by the State as sovereign, or, by its subdivisions, pursuant to state policy to displace competition with regulation or monopoly public service." [435 U.S. at 413.]

Thus, unlike the *Parker* approach which gave the *states* as sovereigns the benefit of an implied exclusion, the *Lafayette* decision requires that *cities* claiming exemption demonstrate that the key policy choice to subjugate the competitive regime to regulation was indeed a choice made by the *state* as sovereign. The Court noted that the Congress had demonstrated its capacity to clearly confer municipal antitrust exemptions where deemed necessary, 435 U.S. at 397 n.14, and that the purposes of the *Parker* doctrine are not served by subjugating federal policy to local action which is *not* sovereign action, 435 U.S. at 408-413.

Also raised and rejected in *Lafayette* is the now-familiar claim that municipal conduct is not really within the purview of antitrust law because, unlike private business conduct, it is not motivated by private profit and power. This Court observed that,

> Petitioners next argue that the antitrust laws are intended to protect the public only from abuses of private

> power and not from actions of municipalities that exist to serve the public weal.
>
> Petitioners' contention that their goal is not private profit but public service is only partly correct. Every business enterprise, public or private, operates its business in furtherance of its own goals. In the case of a municipality owned utility, that goal is likely to be, broadly speaking, the benefit of its citizens. But the economic choices made by public corporations in the conduct of their business affairs, designed as they are to assure maximum benefits for the community constituency, are not inherently more likely to comport with the broader interests of national economic well-being than are those of private corporations acting in furtherance of the interests of the organization and its shareholders. [435 U.S. at 403.]

That observation, that the municipal objective of furthering a constituent interest is no more procompetitive or economically beneficial than the profit motive of private businesspersons, is even more cogent in the case of rent control which sacrifices one small constituent interest to the benefit of a larger constituency, imposing economic costs on the entire city as well as interstate components of housing simply to please one well-organized group.

This Court also addressed in *Lafayette* the suggestion, heard still, that municipalities can never really stray too far too long from that path of wisdom and justice because of the self-correcting nature of politics; yet clearly, the victimized minority, many of them disenfranchised nonresidents, cannot politically compete in this battle between market freedom and the raw self-interest of the incumbent tenant constituency. Nor should that political struggle be *necessary* for the policy choice has already been made by the Congress.[4]

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[4] As the Court noted in *Lafayette,* the claim that "political control" renders federal antitrust regulation unnecessary is without merit, for that could be said as well of private anticompetitive activity and misses the point that Congress has "mandated competition as the polestar" of economic policy and "did not leave this fundamental national policy to the vagaries of the political process." 435 U.S. at 405-407.

Because of the market power wielded by cities, and because they naturally have motives, as does a businessperson, to thwart the competitive regime in pursuit of their objectives, this Court has reasoned that the existence of a coherent national economic policy would be endangered by the prospect of some 63,000 independent entities, each practicing its own peculiar brand of economic policy:

> When these bodies act as owners and providers of services, they are fully capable of aggrandizing other economic units with which they interrelate, with the potential of serious distortion of the rational and efficient allocation of resources, and the efficiency of free markets which the regime of competition embodied in the antitrust laws is though to engender. If municipalities were free to make economic choices counseled solely by their own parochial interest and without regard to their anticompetitive effects, a serious chink in the armor of antitrust protection would be introduced at odds with the comprehensive national policy Congress established. [435 U.S. at 408; footnote omitted.]

Certainly a city's power to distort the market as a buyer or seller is dwarfed by the dislocations offered when it imposes upon the *entire* market the iron fist of government dictate.

Because of the risks posed by a proliferation of municipal anticompetitive conduct to the national economic policy—because of an inherent tension between "parochial" objectives and national economic objectives—this Court declined in *Lafayette* to craft an implied exclusion for municipalities: "We conclude that these additional arguments for implying an exclusion for local governments must be rejected." 435 U.S. at 408. This Court then determined that cities could not avail themselves of their states' *Parker* exemptions unless the cities' conduct is "state action," defined as conduct pursuant to a state policy choice to displace competition:

> Cities are not themselves sovereign; they do not receive all the federal deference of the States that create them. *Parker's* limitation of the exemption to "official action directed by a state," 317 U.S., at 351, 63 S.Ct., at 313, is

consistent with the fact that the States' subdivisions generally have not been treated as equivalents of the States themselves. In light of the serious economic dislocation which could result if cities were free to place their own parochial interests above the Nation's economic goals reflected in the antitrust laws, *see* supra, at 1131-1134, we are especially unwilling to presume that Congress intended to exclude anticompetitive municipal action from their reach.

* * *

We therefore conclude that the *Parker* doctrine exempts only anticompetitive conduct engaged in as an act of government by the State as sovereign, or, by its subdivisions, pursuant to state policy to displace competition with regulation or monopoly public service. [435 U.S. at 412-413 (footnote omitted; citations omitted).]

Similar considerations led to a similar conclusion in *Community Communications Co.* v. *City of Boulder,* 455 U.S. 40 (1982). Again in *Boulder* this Court had to confront the claim that cities share in the sovereignty of their states, even though that issue had in fact been resolved in 1890 at the time the Sherman Act was enacted. *See Lincoln County* v. *Luning,* 133 U.S. 529 (1890), and *Lafayette,* supra, 435 U.S. at 412 n.42. The uniqueness which perhaps justified renewal of the claim in *Boulder* was that city's status under a "home rule" provision of the state constitution, which confers a form of *intra-state* sovereignty. This novelty persuaded the Tenth Circuit that Colorado's constitutional grant of municipal autonomy effectively vested the state's "sovereignty" in the city. 630 F.2d 704, 707. This Court reversed, reaffirming that in federalism sovereignty may not be partitioned and distributed like so many slices of an apple:

> But plainly the requirement of "clear articulation and affirmative expression" is not satisfied when the State's position is one of mere *neutrality* respecting the municipal actions challenged as anticompetitive. A state that allows its municipalities to do as they please can hardly be said to have "contemplated" the specific anticompetitive actions

for which municipal liability is sought. Nor can those actions be truly described as "comprehended within the powers *granted*," since the term, "granted," necessarily implies an affirmative addressing of the subject of the State. The State did not do so here: The relationship of the State of Colorado to Boulder's moratorium ordinance is one of precise neutrality. As the majority in the Court of Appeals below acknowledged, "we are here concerned with City action in the absence of any regulation whatever by the State of Colorado. Under these circumstances there is no interaction of state and local regulation. We have only the action or exercise of authority by the City." 630 F.2d, at 707. . . . Acceptance of such a proposition—that the general grant of power to enact ordinances necessarily implies state authorization to enact specific anticompetitive ordinances—would wholly eviscerate the concepts of "clear articulation and affirmative expression" that our precedents require. [455 U.S. at 55-56.]

Yet the approach adopted by the California court and defended by Berkeley herein would no less eviscerate those precedents. If, as seems clear from the *Lafayette* and *Boulder* opinions, cities are "persons" subject to the Act, and the Congressional intent was to tolerate regulatory experimentation by fifty sovereign *states* without inviting the chaos of 63,000 independent mini-sovereigns declaring their own economic policy displacing that of the federal government, then the "California test" is an anathema to federal policy, for its patent objective and eminently predictable result is to free municipalities to pursue parochial interests at the expense of national economic policy. Its sanction by this Court would require nothing less than a full recantation of not only the *conclusions* of *Lafayette* and *Boulder,* but also the basic reasoning of both cases as well as others, most notably *Garcia* v. *San Antonio Metropolitan Transit Auth.,* 105 S.Ct. 1005 (1985).

Garcia is directly implicated because Congress has now spoken clearly and succinctly as to its intentions for municipal coverage under the Sherman Act. The legislative history of the Local Government Antitrust Act of 1984, P.L. 98-544, is in fact a sterling example of the political accountability and responsi-

veness of Congress to the needs of local government. That was central to *Garcia's* rationale that the political process, and not some constitutional limitation on Congressional power, provided the safeguard for local concerns in a federalist system. Highly reminiscent of Mr. Justice Stevens' admonition in *National Society of Professional Engineers* v. *United States,* 435 U.S. 679 (1978), that exemption arguments based on policy are best addressed to the Congress,[5] the experience of local governments seeking a blanket exemption demonstrated that while they cannot always get what they want, they can and did get what they needed.

What the cities *got* from Congress was what they *needed*—an exemption from the potentially catastrophic remedy of damage judgments for antitrust violations. What the cities *wanted* yet were consciously denied by the Congress was a blanket exemption for *all* governmental action, or at least all such action taken in pursuit of "health, safety, and welfare." It is that exemption, expressly and consciously denied by Congress, which Berkeley now seeks to uphold.

The Legislative History of P.L. 98-544 amply demonstrates that Congress considered and rejected express exemptions of the variety now sought to be inserted into the Sherman Act by judicial implication. Details of a number of "health, safety and welfare" exemptions considered and rejected by the Congress are set forth in our *Amicus Curiae* Brief in Support of the Jurisdictional Statement at 11-14.

Unlike the 51st Congress which enacted the Sherman Act without leaving any express record of intent toward or even consideration of municipal action, the 98th Congress has left a straightforward record of its consideration *and rejection* of substantive changes in the definition of conduct offending the antitrust laws. The House Judiciary Committee Report to the Committee of the Whole House on H.R.6027, H.R.Rep. 98-965, 98th Cong., 2d Sess. (1984), recites in some detail the proposals placed before the Congress as well as the vast and

[5] "That kind of argument is properly addressed to Congress and may justify an exemption from the statute for specific industries, but it is not permitted by the Rule of Reason." [435 U.S. at 689-690.]

varied testimony presented to them on the issue. That Report is by no means uncertain as to whether Congress had intended to modify the substantive law:

> Although the Committee received testimony favoring broader immunity for local governments, it chose at this time to address only the issue of antitrust damage suits.
>
> * * *
>
> H.R.6027 would in no way limit the antitrust immunity for States that the courts have recognized in Parker v. Brown, 317 U.S. 341 (1943), and subsequent decisions interpreting the "state action" doctrine. *The bill eliminates certain damage suits under the Clayton act without altering judicial interpretation of the substantive antitrust law. For example, there will be no change in the substantive antitrust law applicable to local governments, or persons with whom they deal, in suits for injunctive relief under Section 16 of the Clayton Act, or in enforcement actions by the Department of Justice or the Federal Trade Commission under other statutory provisions.* [*Id.* at 2 (emphasis added).]

The Report also describes the urgings for a "municipal rule of reason," strikingly similar to the rule declared below, which was rejected by the Congress. Finally, the Report reveals the Congressional reasoning which led to the rejection of wholesale substantive exclusions for municipal acts:

> The Subcommittee did not adopt the concept of a ban against private actions aimed at municipalities and their officials. The role of "private attorneys general" in the antitrust enforcement scheme remains central. *If Congress were confident that the actions of local governments and their officials were always in the public interest or would never work unnecessary anticompetitive injury, it could simply exclude them from the application of the antitrust laws entirely. The record does not support such action at this time.* The record does support, however, the notion that municipalities—and their taxpayers who must ultimately shoulder the burden—should not be subject to punitive sanctions in the form of treble damages. [*Id.* at 18 (emphasis added).]

It is fair to state, then, that the policy considerations underlying the lower court's opinion, and particularly a "health, safety, welfare" defense limited only by a "less restrictive" means test, have been carefully considered by Congress, and a Congressional judgment has been made that such sweeping changes in substantive application of the laws were not warranted at this time.

II. BERKELEY IS NOT ENGAGED IN "STATE ACTION"

Berkeley urged below that its price-fixing activity was exempt from antitrust scrutiny pursuant to the "state action" doctrine of *Parker* v. *Brown*, 317 U.S. 343 (1943). Under that doctrine, rooted in the federalist relationship between states and the Nation, this Court perceived that Congress had intended to exempt from antitrust coverage the "state or its officers or agents" engaged in "activities directed by its legislature." *Id.* at 350-351.

Subsequent cases have made clear that cities share in the state's exemption only to the extent they meet that description. Acting as agents of the state implementing policy directions by the legislature, they are deemed to be engaged in "state action." The issue has evolved into a test turning upon the existence of a "clearly articulated" and "affirmatively expressed" state policy to displace competition with regulation in the questioned activity. *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 410, 413 (1978); *Community Communications Co.* v. *City of Boulder* 455 U.S. 40, 51 (1982); *Town of Hallie* v. *City of Eau Claire*, 105 S.Ct. 1713, 1717 (1985).

This Court emphasized in *Boulder* that mere *neutrality* on the part of the state would not invoke the exemption, for federalist comity gained nothing from derogation of national policy: "to permit municipalities to be shielded from the antitrust laws in such circumstances would impair the goals Congress sought to achieve by those laws . . . without furthering the policy underlying the *Parker* 'exemption'." 455 U.S. at 55-56; *see also Lafayette*, 435 U.S. at 415.

The relevant portions of statutes whereunder Berkeley has lately sought exemption below are reproduced in the Jurisdictional Statement at pages 4-5. They are without

exception expressions of neutrality toward controls or specific prohibitions on imposition of controls upon various types of housing. Nowhere therein is there to be found any expression of policy favoring such controls. As the Court below noted, "California has no state rent control statute." 37 Cal.3d at 655, Appendix at A-6.

The court below was extensively briefed on this issue, ruled that it was properly raised therein, Opinion below, 37 Cal.3d at 654 n.3, Appendix at A-5 n.3, and declined to rule thereon, relying as it did on its novel approach to preemption analysis and antitrust law. *Id.* at 678, A-35. This question of congressional exemption from federal law is ultimately a question of federal law. *Town of Hallie,* supra, 105 S.Ct.at 1719 n.8. Since it was properly presented to the state court, and that court declined to rule thereon, the issue is properly justiciable in this Court. *Chambers* v. *Mississippi,* 410 U.S. 284, 290 n.3 (1973). We respectfully request this Court to acknowledge the obvious, that Berkeley's price-fixing scheme reflects only the policy of the City of Berkeley and not that of the State of California.

CONCLUSION

Berkeley has made a judgment that competition in housing was producing results conflicting with its social engineering policies. Its response was to reject the free market in favor of price-fixing, conferring a short-term pocketbook favor upon a favored, supportive constituent bloc (tenants) at the expense of a disfavored, nonsupportive minority of landowners and businesspersons, and to the exclusion of prospective tenants who otherwise would move to Berkeley and compete economically for rental properties. Berkeley's scheme has all the earmarks of a per se illegal buyers' cartel, restricting output, barring market entry, and banishing price competition and, indirectly, *quality* competition altogether. As forewarned by this Court in *Lafayette,* Berkeley's governmental status does not detract from the fact that just like a businessperson it has its own set of goals and objectives distinct from those of the Sherman Act which Congress *intended* to protect.

The opinion below would permit any city to fix the price of any or all commodities without any affirmative sanction from either the Congress or the state. Certainly this was not the Congressional intent. Conversely, a finding of preemption herein will merely mean that should the State of California truly intend to authorize Berkeley's price-fixing practices its Legislature needs only to enact a law so stating. Certainly the existing state laws offer no hint of such a policy, although all or virtually all other anticompetitive municipal programs in this State and elsewhere enjoy express authorizations.

Rent control is price-fixing which has no *economic* novelty to it which justifies its removal from the per se realm of illegality. It is a wilful abandonment of Congressional competitive policy. Congress has just reaffirmed its intent to control anticompetitive municipal action which lacks state policy to justify itself. Such is the case here. We respectfully urge this Court to declare Berkeley's ordinance preempted by the Supremacy Clause of the United States Constitution because it fatally conflicts with the Sherman Act.

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